

IN RE:

SHELBY COUNTY SCHOOL SYSTEM

NO. 03-23

OFFICE OF LEGAL SERVICES
SEP 17 2003
DIVISION OF
SPECIAL EDUCATION

This case arose at the filing of a Due Process Hearing request by Ms. [REDACTED] on behalf of her daughter, [REDACTED]. The respondent, the Shelby County School System, defended the case and the matter was heard over a period of four (4) days with each side presenting witnesses to support their respective positions. The 45 day period from the filing of the request on April 28, 2003, was waived by both parties and the hearing was commenced on July 14, 2003, at the offices of the Shelby County School System.

The mother, [REDACTED], has shown herself to be a relentless and well-informed advocate for her child and has demonstrated a knowledgeable approach in representing [REDACTED]. Ms. [REDACTED] has been offered and participated in all procedural safeguards and the

school system has given notice and allowed meaningful participation by the parent at all stages.

Prior to the hearing, the parties entered into several phone conferences with the Administrative Law Judge in order to identify the issues and exchange witness lists. Subpoenas were issued for both the parent and the Shelby County School System and the school system made school personnel available as requested by the parent.

The respondent filed a late motion for summary judgment or, in the alternative, a request for a Due Process Hearing. This motion was filed one day prior to the commencement of the Due Process Hearing. The Administrative Law Judge ruled that the motion was not timely filed, but would be reviewed again if the respondent moved for a directed verdict at the conclusion of the plaintiff's proof.

At the conclusion of the plaintiff's proof, the respondent moved for a directed verdict which was granted on the issues of: (a) failure to provide an adequate transition plan and, (b) failure to provide adequate assistive technology.

FINDINGS AND OPINION

A. DEVELOPMENT OF ISSUES TO BE HEARD:

(Stipulated issues are made a part of the record as Exhibit 39)

The child, [REDACTED] (hereinafter referred to as [REDACTED]) is the subject of the controversy and it is the position of the parent that [REDACTED] should be provided with inclusion in all academic and extra-curricular areas of the school environment. For hearing purposes, the following issues were stipulated by the parties as being the issues to be tried:

1. Section 504 violations: Ms. [REDACTED] wanted [REDACTED] to be enrolled in and participate in the color guard for the high school she was attending. The school system did not feel that [REDACTED] was capable of participating because she was wheel chair bound; could not meet the physical criteria for color guard participation; and would not receive any benefit from the participation.

2. Inclusion/Mainstreaming/Least Restrictive Environment: Ms. [REDACTED] alleged that the school system failed to provide a free appropriate public education for [REDACTED] because they placed her in a CDC classroom for most of the day and she was unable to be with other children in the normal academic

setting. Ms. [REDACTED] contends that the least restrictive environment for [REDACTED] is the regular classroom and the Shelby County School System contends that the least restrictive environment is a Comprehensive Development Class with some modifications for attendance in physical education and lunchroom.

3. Unavailability of an appropriate transition plan: Ms. [REDACTED] contends that the Shelby County School System filed to develop specific goals and objectives in the IEP which could be seen as a transition plan for her daughter of 17 years of age. The Shelby County School System believes that they had made specific goals, but this is a child who will be with the System for at least another 4 years and, therefore, a more definite plan is premature.

4. Failure to provide appropriate assistive technology: Ms. [REDACTED] contends that the school system was not open or receptive to enhancing the assistive technology purchased and used with [REDACTED]. The school system utilizes a single switch mechanism which can be configured to make music or sounds when the button is pressed. Ms. [REDACTED] believed that it would be more appropriate to have assistive technology which has more than one option for [REDACTED] with each option providing a different stimulus.

5. Failure to implement the program as recommended by the IEP team: It was alleged by the parent that the IEP team concluded that it would be beneficial to [REDACTED] for her to be in the jazz band and attend the performances of the jazz band. The school system believed on the first instance that the IEP team considered this action on a trial basis, but, in any event, [REDACTED] missed so many days, she was neither available nor prepared to perform at a jazz band performance.

6. Failure to provide direct services for occupational therapy, speech therapy, and physical therapy: The parent alleged that the school system failed to provide direct services and instead implemented programs whereby [REDACTED] would not have the benefit of a therapist's expertise. The school system took the position that the therapist in each instance believed that [REDACTED] would best benefit from therapy in each category on a daily, almost hour to hour basis, rather than having speech therapy, occupational therapy, and physical therapy once or twice a week. The system trained the CDC teacher to conduct the specific therapy regularly during the day.

7. Refusal to provide independent assistive technology evaluation as requested by the parent: Ms. [REDACTED] indicated that she requested an independent evaluation and the system either never responded or failed to offer the service. The school system indicated that they offered the opportunity and provided the name of the evaluator for Ms. [REDACTED], but Ms. [REDACTED] simply failed to take [REDACTED] at a scheduled time.

8. Violated IDEA by conducting a December IEP meeting without the presence of Ms. [REDACTED], who had called the day of the meeting and said she could not attend: The school system takes the position that the meeting had, in fact, been scheduled and Ms. [REDACTED] did not call until all personnel had been gathered. The meeting went forward when Ms. [REDACTED] stated that she would not attend, however, there were no changes made in the IEP and the minutes were taken to Ms. [REDACTED] after the meeting. The school system went further to indicate that the plan would not be implemented until another meeting could be held when Ms. [REDACTED] could be present.

Caught up within these issues, which were identified by the parent, Ms. [REDACTED], further opined that she believed the school system was not providing FAPE in that they failed to include [REDACTED] in jazz band performances, regular physical

education classes, or participate in the color guard. The school system had also agreed to allow [REDACTED] to call home daily and this was not being followed.

B. THE STUDENT:

[REDACTED] was born on March 1, 1986, with a brain tumor which required surgery for its removal. At the conclusion of the surgery, a cranial shunt was implanted which has been recently replaced. The course after the surgery resulted in complications and the onset of cerebral palsy.

A pediatrician, Dr. Scott Kloek, who is chairman of pediatrics at Methodist Germantown Hospital in Memphis, Tennessee, has seen [REDACTED] on numerous occasions and reviewed her medical history. Dr. Kloek was the only expert medical witness to testify in this case. He described [REDACTED] as being severely developmentally delayed, cortically blind, and having severe cerebral palsy secondary to hemangioblastoma. Dr. Kloek states, in reference to [REDACTED]'s ambulation, that she is basically a quadriplegic. In addition to her other concerns, [REDACTED] has two dislocated hips that prevent her from being functional in her lower extremities.

In terms of communication, Dr. Kloek noted that [REDACTED] is non-verbal and that "she has not responded back to me in any way."

(Kloek deposition, page 10)

Considering all factors, Dr. Kloek opined that [REDACTED] could possibly benefit from being around other children, but she has no chance of making any cognitive progress. (Kloek deposition)

The Shelby County School System placed [REDACTED] in CDC class, but during the 2002-2003 school year, at the parent's request, allowed [REDACTED] to be included in jazz band, lunchroom, and adaptive physical education on a trial basis. (Joelyn Bellanti, page 485-489) There was absolutely no evidence in the record that [REDACTED] acknowledged, in any manner, her attendance in these classes. There was no evidence that [REDACTED] benefited in any manner by her participation in jazz band. It was believed that [REDACTED]'s goals and objectives could not be met, even with supplementary assistance in the jazz band and art classroom setting. (Oehmen, page 620) However, the special education director, Sue Oehmen believed that the adaptive physical education class and the lunchroom inclusion was successful for [REDACTED]. (Oehmen testimony, page 615)

There was no evidence that [REDACTED]'s presence in any of the classes that she attended on a trial basis was disruptive to the regular program. Although a rattle type musical instrument was placed in [REDACTED]'s hand in jazz band, which she shook at all times, there was no proof that this was detrimental to the program.

(testimony of Kimberly Hass and Lena Sparks) Ms. [REDACTED] desired for [REDACTED] to become a member of the color guard, however, it was determined that this would not be an appropriate activity in that [REDACTED] could not perform the essential functions even with accommodations. (Bellanti, page 438)

The school psychologist, Barbara Cherry, indicated that if [REDACTED]'s IQ dropped as she grew older, this was possibly due to the fact that as she grew older, the IQ of other children her age would, of course, increase and [REDACTED] could not ever expect to be age level. [REDACTED] had an IQ of 11. Further, Ms. Cherry indicated that it is very important that [REDACTED] spend the greater part of her day in the structured setting of the CDC classroom where there were no distractions. (Cherry, page 282) Ms. Cherry further opined that the best testing device for evaluation purposes for [REDACTED] was a functional assessment rather than an IQ test and in testing [REDACTED] with this instrument, she functions anywhere between 0-12 months of age. (Cherry, page 310)

[REDACTED] is non-ambulatory and is unable to care for herself in even the most simple task. She has shown progress over the years when working one-on-one with a home care giver. Carol Denise Giles, a home care provider, indicated that the greatest improvement she has seen in [REDACTED] is her ability, at times, to sit up on a couch with just a pillow behind her to hold her up. (Giles, page 267)

Ms. Giles further opined that you have to be very careful in moving [REDACTED] or she will be injured and feel significant pain. (Giles, page 261) On the other hand, however, due to [REDACTED]'s bilateral hip dislocation, it is imperative to reposition [REDACTED] constantly. (Giles, page 261)

C. MOTION FOR DIRECTED VERDICT:

At the conclusion of the petitioner's proof, the respondent moved for a directed verdict as to all issues. Upon consideration of the proof, the Administrative Law Judge granted the directed verdict as to the following issues:

1. Unavailability of appropriate transition plan: The school system has in place the beginning of a transition plan for [REDACTED]. This plan is one which can be expanded as time goes on and is basic because the needs of [REDACTED] are basic. The transition plan calls for such techniques as placing a coat at [REDACTED]'s hand and hoping to get a response of her straightening out her hand pushing it into the coat. While [REDACTED] will move her arms about, it cannot be determined, at this time, that [REDACTED] has ever pushed her arm in response to the coat being placed at her hand. Further transition concepts are included in the feeding regime whereby the assistant placed food in the spoon that has been specially made for [REDACTED] and hoping that [REDACTED] will

voluntarily move her arm toward her mouth. To date, the assistant has never received a response as she assists [REDACTED] in moving the spoon toward her mouth to be fed. It is recognized by all parties that [REDACTED] is just 17 years of age and a transition plan should be in the early stages. There was no proof in the record that a transition plan was unavailable.

2. Refusal to provide independent assistive technology evaluation as requested by the parent: There was absolutely no proof by the petitioner that the school system had failed to respond to the parent's request in this regard. The school system had provided a list of evaluators to Ms. [REDACTED] and had given her the addresses and phone numbers of each evaluator. All Ms. [REDACTED] had to do was call and set up an appointment, which was never done, to the date of the hearing.

D. LEGAL ANALYSIS:

While there are numerous issues, most, if not all concerns, funnel into the realm of inclusion and least restrictive environment for this student.

The Individuals with Disabilities Education Act provides federal funds to assist states as they implement programs to educate disabled students.

20 U.S.C. Section 1411

Pursuant to the Act, it is required that each state provide what has been deemed "free appropriate public education to all children with disabilities residing in the state."

20 U.S.C. 1412(a)(1)

In order to create and implement a free appropriate public education, each system seeks the advice, input, and expertise of a team called an IEP team which develops an Individualized Educational Plan for each child based upon the needs of that particular child. This case is no exception and an IEP was developed for [REDACTED], initially, and modified throughout the years. (testimony of Special Education Direction, Jo Bellanti)

In furtherance of the spirit of including disabled students with non-disabled students, the legislation requires that to the maximum extent appropriate, children with disabilities should be educated with children who are not disabled and removing disabled children from the regular curriculum should only be done when the nature or severity of the disability of a child is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. 1412(a)(5)

This requirement is a mandate in favor of mainstreaming. Mainstreaming involves the education of a disabled child alongside of non-disabled children to the maximum extent appropriate based upon the needs of the individual child.

In Ronocker v. Walter, 700 F.2d1062(6th Cir. 1983), the court set forth three factors for determining whether the mainstreaming or full inclusion requirement of IDEA may be overcome: (1) whether or not the disabled student would benefit from inclusion from general education; (2) whether such benefits would be outweighed by benefits that are provided in an inclusion setting; and (3) whether the disabled child disrupts the general education setting.

Ronocker at 1063

In contrast, it is recognized that the regular classroom setting is not an appropriate setting for many disabled children. The nature and severity of each child must be examined in order for the school system to provide an appropriate educational plan designed to meet the unique needs of the disabled child.

Board of Education of the
Hendrick Hudson Central School
District, Westchester County,
vs. Amy Rowley, 458 U.S. 176,
102 S.Ct. 3034 (1982)

In order to insure the implementation of an appropriate educational program which, to the maximum extent appropriate includes children with disabilities in the same setting as non-disabled children, the system must develop an Individualized Educational Program which: (a) establishes the child's current level of educational performance, (b) provides for the measurement of appropriate goals, and (c) takes into consideration assistive technological devices and supplementary aids to enhance the specialized program.

20 U.S.C. 1412(a)(1)

Students who are disabled should have the benefit of being involved with non-disabled students in both academic and non-academic settings. Claims made under Section 504 are engrained with least restrictive environment parameters just as under the IDEA. School districts shall place disabled students in the regular educational environment, both academic and extracurricular, unless the school district can demonstrate that the placement of the student in an inclusive setting, with supplementary aids or devices, would not be beneficial to the child.

The parent, [REDACTED], filed the request for a Due Process Hearing and she clearly bears the burden of providing by a preponderance of the evidence that the IEP developed by the Shelby County School System was not appropriate for Missy.

The issue presented by the parent did not involve methodology, but, instead, the focus of the argument was whether or not [REDACTED] should be educated alongside other non-disabled children in the school setting. Specifically, the parent argued that [REDACTED] should be involved in jazz band, art class, life sciences, physical education, cafeteria, and other environments where non-disabled children could be found. Her claims are made under IDEA and Section 504.

The Shelby County School System takes the position that the CDC classroom at Cordova High School can provide services for [REDACTED] [REDACTED] which are far superior to those that could feasibly be provided in a mainstreaming or inclusive setting. The school system has fashioned an educational program for [REDACTED] which provides for an adaptive physical education class where non-disabled children interact with disabled students, such as [REDACTED], and [REDACTED] is generally taken to the lunchroom where she has the opportunity to be in a setting with non-disabled children. The IEP team believes that any further reaction between [REDACTED] and non-disabled children is detrimental to her program and any

benefit gained with other inclusive settings would be marginal at best.

E. FINDINGS OF FACT:

1. [REDACTED] is enrolled at Cordova High School in the Shelby County School System and is assigned to the Comprehensive Development Class. (Lena Sparks, page 818) The CDC class is made up of a teacher, two (2) assistants, one (1) full-time nurse, and six (6) students. (Bellanti)
2. [REDACTED] presents with severe cerebral damage; bilateral dislocated hips; cortical blindness; infrequent seizure disorders; and, at times, spastic paraparesis in her upper extremities. (Dr. Kloek)
3. [REDACTED] functions at a level that is consistent with a 0-12 month old child and she has an IQ of 11. (testimony of Barbara Cherry, page 310)
4. There was no proof from any witness that [REDACTED] had shown any progress or development as a result of her inclusion in jazz band, art class, lunchroom, or adaptive physical education at Cordova High School. (testimony of Haas, page 727)

5. [REDACTED] is non-verbal and while there is proof that she, at times, appears to smile or turn her head in response to auditory stimuli, she has not been shown to respond to her educational setting to any measurable extent. (Carol Giles, page 242) [REDACTED] generally responds to auditory stimuli by turning her head and, at times, smiling. (Reginald Wood, page 357)

6. [REDACTED] can operate a simple single switch stimulus only so long as a teacher or assistant is holding her hand and places it on the device and pushes the switch in order to obtain the desired result. [REDACTED] does not respond in a measurable way to the stimuli. (Sparks, page 818) [REDACTED] cannot reason that if she hits a switch, a response will be elicited. (Cherry, page 320)

7. Medically, [REDACTED] needs to be moved from her wheelchair or repositioned frequently due to the pain induced by her bilateral hip dislocation. Her CDC room has a side-lyer and bean bags where [REDACTED] is repositioned throughout the day to insure that she is not exposed to undue pain. Further, the CDC classroom has a changing area and toilet facilities which are necessary due to [REDACTED]'s incontinence. (Lena Sparks; Dr. Kloek; Giles, page 261)

8. The parent, [REDACTED], did not attend an IEP meeting on December 17, 2002, which went forward in her absence. [REDACTED] had notice of the meeting and, apparently, planned to attend, but was unable to do so and called the school and cancelled while the team was gathering to meet. Subsequent to the meeting, the school personally notified Ms. [REDACTED] of the minutes of the meeting and indicated to her that nothing in the prior IEP had changed and would not change until another meeting could be scheduled at a time when Ms. [REDACTED] could attend. A follow-up meeting was held on January 28, 2003, when all necessary parties were present. There was no change in the IEP arising out of the December 17, 2003, meeting and no detrimental impact on [REDACTED].
(Jo Bellanti)

9. There can be no accommodation that would allow [REDACTED] to participate in jazz band, art class, or color guard such that the experience would be meaningful for her or provide an educational benefit in any fashion. (Bellanti/Oehmen)

10. [REDACTED] has not made any meaningful response to the efforts made by the teachers in the Shelby County School System to instruct her in the classes that she has attended outside the CDC classroom. It is believed, however, that

inclusion in adaptive physical education and lunchroom are successful. (Oehmen, page 615)

11. The single switch technology utilized with [REDACTED] is a basic device and there is no evidence that this has either been mastered or acknowledged, allowing the instructors to move to more complex technologies to assist in [REDACTED]'s educational experience. (Cherry, page 320)

12. Due to [REDACTED]'s severe disability, direct services for occupational therapy, speech therapy, and physical therapy would deprive her of opportunities that she now received from consultative services in the CDC classroom. (Faucher, page 954)

13. In the Comprehensive Development Class, the teacher and assistants are trained by the licensed speech therapist, occupational therapist, and physical therapist to constantly work with [REDACTED] in a manner which provides daily therapeutic enhancements in these areas. The speech therapist has caused the teacher and assistants to constantly talk with [REDACTED] as they move her and work with her and, hopefully, [REDACTED] will recognize that the verbalizations are in conformity with the action being taken. The occupational therapist has instructed the teacher and assistant to hold a

shirt or coat sleeve at the end of [REDACTED]'s arm and tell her they are putting the clothing on her in hopes that her movement toward the clothing will be recognized as an attempt to push her arm into the sleeve. Further, the teacher and assistants have been instructed on holding their hand over [REDACTED]'s hand to grasp a spoon and then move it into the plate for food and then to her mouth in an effort to cause [REDACTED] to understand that this is the process for eating. (Faucher/Giles)

14. The Shelby School System has, at the request of the parent, convened no less than five (5) IEP meetings in an attempt to develop a program that is best suited for [REDACTED] [REDACTED]. (Deposition of Carol Hart)

15. The classroom teacher is convinced that further inclusion for [REDACTED] would be detrimental to her educational program and even when [REDACTED] is taken to the cafeteria, the classroom teacher cannot determine whether [REDACTED]'s movements and turns are the result of the noise and movement of non-disabled students in the cafeteria or the result of something the teacher is doing with [REDACTED] as she tries to assist her in eating.

16. [REDACTED]'s psychological evaluation entered as Exhibit 1 in this cause arose out of a April 12, 1995, test and indicated "intellectual functioning in the profound to severe range of mental retardation; developmental levels varied from one to nine months with and average of six months."

17. The December 2002 IEP meeting where the mother did not attend did not represent a substantive change in the prior program and there was no action taken to change the prior IEP until the parent could meet with the IEP team in January of the following year. (Bellanti)

18. The single switch assistive technology used with [REDACTED] at Cordova High School has been used with [REDACTED] and is part of her educational program. [REDACTED] cannot operate this device without assistance.

19. The Shelby County School System has developed a Functional Goals Assessment format whereby [REDACTED]'s goals can be monitored and her educational program enhanced. The goals are specific and provide for the ability of the teacher or assistant to determine when goals are met. (Exhibit 11 to the record)

20. The deposition testimony of Dr. Scott Kloek, M.D., board certified pediatrician, (introduced as Exhibit 40 to the record), was neither disputed nor contradicted by any other expert in this case. Dr. Kloek opined:

a. [REDACTED] has severe developmental delay (page 6, line 9);

b. Her development level would be consistent with an 18 month old child (page 7, line 3);

c. At age 16, her cortical blindness will probably not be reversed (page 7, line 19);

d. She had an hemangioblastoma at birth and had surgery around ten weeks of age, and she had some complications as a result of that surgery (page 8, lines 3-7);

e. "I have written in my notes in the past that she was basically a quadriplegic. She really doesn't have any control of her arms, but I've never seen her have any arm movements that have been out of control. She just doesn't move them." (page 9, lines 11-16);

f. [REDACTED] has not responded to me in any meaningful way. (page 10, lines 5-6);

g. It is important for [REDACTED] that she be moved and her position changed often. (page 13, lines 19-22);

h. Based on [REDACTED]'s cognitive damage, she does not have any chance of making progress. (page 20, line 3);

i. I have noticed that [REDACTED] responds to touch, but do not know if she is reacting negatively or positively. (page 27);

j. [REDACTED] could benefit from being around kids without disabilities. (page 31, lines 3-4);

k. The mother wants PT, OT, and speech therapy several times a week. The mother doesn't seem to understand that [REDACTED] is not going to improve. She does need to maintain her flexibility and some muscle tone. Verbal order for PT, OT, and speech given. (page 35);

l. [REDACTED] will need a 24 hour aide for assistance. (page 37, line 14).

OPINION

██████████ is a severely disabled child who attends Cordova High School in the Shelby County School System. Her mother has taken every measure available to argue and fight for her right to a free and appropriate education within the school system. This child has been evaluated many times and even the slightest progress has been noted. The parent has requested participation in the IEP team by some of the caregivers for ██████████ and the school system has allowed their input. The IEP team has reviewed physician records and taken into account the psychological evaluations prepared for their review. Numerous IEP meetings have been held and because of the mother's persistence, the Shelby County School System has made efforts to enhance the educational program for ██████████, even to the extent that ██████████ was allowed to attend jazz band and art class on a trial basis. There is absolutely no evidence that these programs benefited ██████████ and there was no testimony that her inclusion in these programs initiated a response from ██████████.

One of the numerous IEP meetings took place on December 17, 2002, and the mother called in on that to day to report that she would not attend. The meeting went forth and, based upon the witnesses and the record presented, the failure of Ms. ██████████ to be in attendance on that date did not result in any substantive deprivation of entitlements due ██████████ and there was absolutely no

change in her IEP as a result of that meeting. Procedurally, the Shelby County School System has followed every mandate. The parent's complaint that her lack of attendance at the December meeting is a violation of IDEA is without merit.

██████ is assigned to a Comprehensive Development Class at Cordova High School and pursuant to her IEP, she attend an adaptive physical education class and eats lunch in the regular cafeteria as efforts to include her with non-disabled children. There has been no response from ██████ to show that these inclusive efforts have benefited her, but the socialization appeared to do no harm. The adaptive physical education class gave ██████ an opportunity to leave her classroom and take in new environments, particularly at times when she would be wheeled outside by non-disabled students instructed in proper care. While there is some concern that ██████ may become insured by a non-trained student in this setting, the benefit to being included with non-disabled students seems to outweigh this concern.

Based upon the findings, it is the opinion of this Administrative Law Judge that ██████ would not benefit from mainstreaming or further inclusion because any marginal benefit received from inclusion are far outweighed by the benefit ██████ acquires through the attention she is given in the Comprehensive Development Class. The Comprehensive Development Class teacher

and assistants are trained by the speech, occupational, and physical therapists to provide continuous and structured techniques designed to elicit some response and, hopefully, indicate improvement in her condition. The staff of the CDC class understand and acknowledge that [REDACTED] must be frequently repositioned due to her bilateral hip displacements and they are equipped to care for her hygiene needs.

The IEP team has developed a set of functional assessment goals which can only be implemented by a one-on-one staff with intrinsic knowledge of [REDACTED]'s condition and functional level. This is best accomplished in the Comprehensive Development Classroom.

While there is a Congressional mandate for mainstreaming, this mandate is overcome in a situation such as this where the regular classroom simply would not be a suitable setting due to the severity of this child's disability. Even with supplementary aides and devices, as well as other accommodations that could be considered, [REDACTED] would not benefit from being in the regular classroom with non-disabled children.

The mother is adamant that occupational therapy, physical therapy, and speech therapy should be given on a direct basis rather than consultative, however, direct services in contrast to

consultative services in these areas would be detrimental to the needs of this child. Presently, with consultative services, [REDACTED] is receiving much more benefit than she would otherwise receive.

It is, therefore, ORDERED that:

a. The parent has failed to demonstrate that the Shelby County School System violated Section 504 by failing to allow [REDACTED] to participate in either jazz band or the color guard;

b. The parent has failed to demonstrate that the Shelby County School System failed to provide [REDACTED] with FAPE pursuant to IDEA. The IEP developed for [REDACTED] exceeds that which would benefit this child and, except for adaptive physical education and lunchroom inclusion, the most appropriate and beneficial educational setting for [REDACTED] is within the Comprehensive Development Classroom where she can receive implementation of her program and this is, without question, the least restrictive environment for her;

c. The parent has failed to show that the Shelby County School System is not providing optimal assistive devices. The decision of what type of assistive technology device to use is to be made on an individual basis and it cannot be determined that

██████ is capable of advancing beyond a single switch device at this time;

d. The IEP in place and developed through an exhaustive effort by a multi-faceted team, with parental input, was being followed for ██████ with minor deviations depending on attendance of the child or absence of personnel due to illness, and the parent failed to show that the Shelby County School System was not following the individualized educational program;

e. The educational program for ██████ included consultative services for speech, physical therapy, and occupational therapy. The parent failed to carry her burden to show that these services were not the best and most beneficial services for ██████. There was absolutely no proof that direct services would have been more beneficial to ██████, however, there was proof from the speech and physical therapist that ██████ received more benefits from consultative services than direct services. The IEP developed for ██████, as it concerns consultative speech, occupational therapy, and physical therapy, was appropriate and the most beneficial for this child;

f. As set forth above, the Shelby County School System went forward with a December 2002 IEP meeting without the mother being present, even though the mother knew of the meeting, and it was

anticipated that she would attend. The mother called close in time to the meeting and all parties had gathered for the IEP review. No program changes were made and the mother subsequently had an opportunity to meet for an IEP follow-up. The parent failed to carry her burden that the violation was a violation of IDEA in that there was no substantive violation of a procedural right. These claims are unfounded.

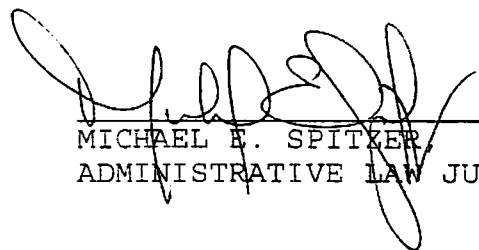
The petition of the parent, [REDACTED], is dismissed as without merit as to all issues.

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal and review must be sought within sixty (60) days of the date of the entry of the Final Order in non-rebursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in this cause.

If the determination of the hearing officer is not fully complied with and implemented, the aggrieved party may enforce it by proceeding in the Chancery or Circuit Court under the provisions of Tennessee Code Annotated, Section 49-10-610, et seq.

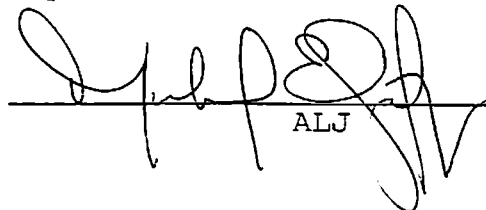
Within sixty (60) days from the date of this Order (or thirty (30) days if the Board of Education chooses not to appeal), the local education agency shall render, in writing to the District Team Leader and the Office of Compliance, Division of Special Education, assurance of the compliance with the provisions of this Order.

Enter this the 15th day of September, 2003.


MICHAEL E. SPITZER
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Ms. [REDACTED], [REDACTED], Cordova, TN 38016, and Mr. Timothy W. Smith, SMITHSHEAHAN, 2670 Union Extended, Suite 1200, Memphis, TN 38112, by enclosing the same in envelopes addressed to them, with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mail box on this the 16th day of September, 2003


ALJ